

A Ng Hee Thong & Anor v Public Bank BhdCOURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-628
OF 1995

NH CHAN, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA

10 DECEMBER 1999

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Civil Procedure — Discontinuance — Judge's discretion — Request for liberty to file afresh on same cause of action — Application for summary judgment disallowed — Matter to go to trial — Whether prejudicial to defendant so as to deprive the defendant of an available defence

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The respondent sued the second and third defendants ('the appellants') as guarantors for a loan given to the first defendant. The respondent's application for summary judgment against the appellants was initially allowed by the High Court but the Court of Appeal directed that the case be entered for trial (see [1995] 1 MLJ 281). The respondent then applied for leave to withdraw its claims against the appellants with liberty to file a subsequent action against the appellants based on the same cause of action as the notices of demand against the appellants were not sent to the proper addresses and their case would be jeopardized. The High Court granted the application and appellants appealed contending that the granting of the order was prejudicial to them as they would be deprived of an available defence. The respondent contended that the learned judge was only exercising his discretionary powers under O 21 r 3(1) of the Rules of the High Court 1980 when granting leave.

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Held, allowing the appeal with costs:

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An appellate court has the powers to review the exercise of a discretionary power by a lower court and in this case, as the learned judge failed to consider the prejudice to the appellants and the fact that the appellants would be deprived of a defence which was available to them, the learned judge had excluded matters that it ought to have taken into account. The respondent was thus granted leave to discontinue the action against the appellants on the terms that no fresh action be brought on the same cause of action based on the same or substantially same factual situation (see pp 33H-34A).

G**[Bahasa Malaysia summary]****H**

Responden telah menyaman defendan-defendan kedua dan ketiga ('perayu-perayu') sebagai penjamin-penjamin satu pinjaman kepada defendan pertama. Permohonan responden untuk penghakiman terus terhadap perayu-perayu telah dibenarkan akhirnya oleh Mahkamah Tinggi tetapi Mahkamah Rayuan telah mengarahkan bahawa kes tersebut didengar untuk perbicaraan (lihat [1995] 1 MLJ 281). Responden kemudiannya telah memohon kebenaran untuk menarik balik tuntutan-tuntutannya terhadap perayu-perayu dengan

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mengambil langkah memfailkan satu tindakan seterusnya terhadap perayu-perayu berdasarkan kausa tindakan yang sama memandangkan notis tuntutan terhadap perayu-perayu tidak diserahkan kepada alamat yang betul dan kes mereka akan terjejas. Mahkamah Tinggi telah membenarkan permohonan tersebut dan perayu-perayu merayu dengan menegaskan bahawa kebenaran memberi perintah tersebut memudaratkan mereka kerana mereka akan menyebabkan beliau tidak dapat menggunakan pembelaan yang ada. Responden berpen-dapat bahawa hakim yang arif hanya menggunakan kuasa budi bicara beliau di bawah A 21 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 semasa memberikan kebenaran tersebut.

Diputuskan, membenarkan rayuan tersebut dengan kos:

Mahkamah yang mendengar rayuan mempunyai kuasa untuk mengkaji semula penggunaan kuasa budi bicara mahkamah yang lebih rendah dan di dalam kes ini, memandangkan hakim yang bijaksana telah gagal untuk mempertimbangkan kemudaratatan tersebut kepada parayu-perayu dan hakikat bahawa perayu-perayu akan tidak dapat menggunakan pembelaan yang ada pada mereka, hakim yang arif telah mengecualikan perkara-perkara yang sepatutnya telah diambil kira. Responden oleh itu telah diberikan kebenaran untuk tidak meneruskan tindakan tersebut terhadap perayu-perayu atas dasar bahawa tiada tindakan baru boleh dimulakan atas kausa tindakan yang sama berdasarkan keadaan fakta yang sama atau yang banyak persamaannya (lihat ms 33H–34A).]

Notes

For cases on judge's discretion on discontinuance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1561–1562.

Cases referred to

Reed (a debtor), *Re* [1979] 2 All ER 22 (refd)
United Asian Bank Bhd v Balakrishnan all Thanakodi [1992] MLJ 587 (refd)

Legislation referred to

Rules of the High Court 1980 O 21 r 3(1)

Appeal from: High Court Civil Suit No 22–372 of 1989 (High Court, Ipoh)

T Gunaseelan (*GK Ganesan* with him) (*A Zahari Kanapathy & Thulasi*) for the appellants.

Ng Chee Kong (*A Silvanathan* with him) (*Kean Chye & Sivalingam*) for the respondent.

A **Ahmad Fairuz JCA** (delivering judgment of the court): This is an appeal against the decision of the High Court at Ipoh allowing the plaintiff's application for leave to withdraw its claims against the second and third defendants with liberty to file a subsequent action against the second and third defendants based on the same cause of action ('the said application').

B The second and third defendants (the appellants in this appeal) were sued as guarantors of a loan advanced by the plaintiff/respondent to the first defendant. The respondent's application for summary judgment against the appellants were allowed by the High Court. The appellants appealed to the Court of Appeal which allowed the appeal and directed that the respondent's suit be entered for trial within 30 days from 16 January 1995
C (see the Court of Appeal's decision in [1995] 1 MLJ 281). The respondent, instead, filed the said application. The reasons for the said application were stated in the respondent's affidavits and the learned High Court Judge had correctly stated those reasons in his grounds of judgment thus:

D The plaintiffs' reason for wanting to discontinue their claim was based on the decision of the Court of Appeal which was to the effect that the respective notices of demand against both the second and third defendants were not sent to their proper addresses. The plaintiffs apparently think that they would be bound to fail in their action against the second and third defendants for the lack of evidence of proper service of the notices of demand. As such they were of the view that there was no proper demand made on the defendants.

E These reasons, according to the appellants, would cause the respondent to fail in its claims against the appellants. Hence, the granting of an order in terms of the said application by the learned judge had definitely prejudiced the appellants and had put them at a disadvantage. In support of this contention, the appellants' counsel had referred this court to 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue), para 74 which reads:

F *Action — Discontinuance of — Whether leave to file action afresh should be granted — Whether application prejudicial to defendants*

G P had earlier obtained summary judgment against D. D had later successfully appealed against the decision of the senior assistant registrar. As triable issues had been raised by D, the court ordered that the matter should go for trial. An early hearing date was accordingly fixed by the senior assistant registrar. However, a day before the hearing date, P applied for an order that they be at liberty to withdraw the action against D and to file afresh against all of D. P averred that they did not serve a notice of demand on D, the guarantors, before filing the writ and that their application was to preempt the possibility of D stating at the trial that they had not been served with the demand. Held dismissing P's application: Taking into account all the circumstances of the case, it was too late in the day for P to make the application since the further delay would be unfair and detrimental to D. Alternatively, the learned judge gave P the liberty to withdraw the action against D without the court granting P leave to file the action afresh.

H *Development & Commercial Bank Bhd v Mohd Samsudin Shafie & Ors* Civil Suit No 488 of 1983 High Court, Ipoh (Abdul Malek Ahmad J) 3 April 1989.
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On the issue of service of the notices of demand, the Court of Appeal (at pp 285I-286E) said:

In the first place, there is the challenge as to the service of the notices of demand which is a sine qua non for the foundation of legal liability under the contracts of guarantee in the present case. As pointed out earlier, there was here a clear and unequivocal assertion that there was no demand ever received. The letters of demand were, as I have already pointed out, sent to addresses that were different from that appearing on the guarantees ... The respondent bank may well have had a good reason for selecting the addresses appearing on the letters of demand. If it did, then, it must have come out and said so and proffered an explanation. In the absence of any explanation, the affirmative statement made by the appellants upon this critical issue remained unchallenged ...

Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v O'Brien* [1988] 3 MLJ 332 ...

Applying this principle to the facts of the instant appeal, it may be safely said that the question whether a demand was ever made and received is one that must be resolved at the trial of the action. On the state of the evidence in the present case, it is an issue that is manifestly unsuitable for resolution upon a summons for judgment. On this ground alone, the appellants ought to have had unconditional leave to defend.

This issue of non-service of the demand notices had also, according to the appellants, been raised by them when they applied to set aside the judgment in default of appearance entered against them by the respondent. The appellants successfully set aside the default judgment. Thereafter, the respondent obtained O 14 judgment against the appellants. Again, the issue of non-service of the demand notice was raised by the appellants when they applied to set aside the O 14 judgment and when on appeal before the Court of Appeal.

It was contended by the appellants that the respondent could have withdrawn the action after the default judgment was set aside as the respondent would have realised the defence raised by the appellants. Instead, the respondent proceeded to obtain the O 14 judgment and tested the appellants' defence again right up to the Court of Appeal. For these reasons, the appellants contended that to allow the respondent to file afresh would be to deprive the appellants of a defence which was available to them. The respondent, on the other hand, contended that the learned judge was exercising his discretion when he granted the said application. The case of *United Asian Bank Bhd v Balakrishnan all Thanakodi* [1992] MLJ 587 was cited in support of the contention. As to discretionary powers of the court, the learned High Court Judge had referred in his judgment to O 21 r 3(1) Rules of the High Court 1980 which is as follows:

Except as provided by r 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the court, and the court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as

- A against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

It is clear from that rule that the court has a discretion whether to grant or refuse leave for discontinuance. Several authorities had been enclosed in the appellants' bundle of authorities in support of the fact that the court has a discretionary power when considering application for leave to discontinue. When confronted with an exercise of a discretionary power by a lower court, an appellate court certainly has the power to review such exercise by the lower court. The Federal Court in *Vasudevan v T Damodaran* [1981] 2 MLJ 150 at p 151G–B said:

- C There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Oseinton & Co v Johnston* [1942] AC 130 at p 148, per Lord Wright). The Privy Council held in *Ratnam v Kumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.
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The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett* [1978] AC 297 (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22 on this point (at p 25):

- F '... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in a law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.'
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- H A perusal of the learned judge's grounds of judgment would show that the learned judge had failed to consider the prejudice and the disadvantage contended to have been suffered by the appellants and the fact that the appellants would be deprived of a defence which was available to them if an order in terms of the said application was granted. The learned judge had thereby, in the words of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22 (referred to above) 'excluded matters that it ought to have taken into account'. Consequently, we have allowed the appeal with costs and set aside the order of the High Court. However, we gave leave to the respondent to discontinue on the terms that no fresh action should be brought on the same
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cause of action based on the same or substantially the same factual situation. **A**

Appeal allowed with costs.

Reported by Chin En Tek

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